In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1365

MORRIS R. BLANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 32–44) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1967. The petition for a writ of certiorari was filed on May 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to permit government counsel, in cross-examining character witnesses for petitioner at trial, to inquire whether the witnesses were

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familiar with derogatory newspaper articles concerning petitioner.

2. Whether the trial judge's remarks to the jury prior to a weekend adjournment constituted prejudicial error.

3. Whether the trial judge's instructions adequately charged petitioner's theory of defense.

4. Whether 18 U.S.C. 152 covers concealment of assets of a corporation by an agent thereof in contemplation of the bankruptcy of that corporation.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on four counts of an indictment charging him with transferring and concealing the property of a bankrupt with intent to defeat the bankruptcy laws, conspiring to do so, and conspiring to commit mail fraud (in violation of 18 U.S.C. 152, 371, 1341).[1] On April 30, 1965, he was sentenced to concurrent terms of forty months' imprisonment on Counts 1 and 2, and to additional forty-month terms on Counts 4 and 5 (these sentences to be concurrent with each other); he was also fined a total of $10,000 ($5,000 on Count 1 and $5,000 on Count 4). The court of appeals affirmed.

The evidence, the sufficiency of which is not in issue, showed that in January or February 1961 one Slote, president of the Sterling Jewelry & Appliance Company (hereinafter "Sterling"), retained petitioner, an attorney specializing in bankruptcy matters, with

[1] Petitioner was acquitted on a fifth count (Count 3).

regard to the company's financial difficulties. At the time, Sterling had debts of $62,000 (App. 61a–63a, 65a, 125a, 151a).[2] Petitioner advised Slote to build up Sterling's inventory so as to increase its debts (App. 66a–67a, 77a, 81a, 199a–200a, 213a). Slote thereafter ordered large quantities of furniture and appliances (App. 73a–74a, 79a). Pursuant to additional instructions from petitioner, he stored most of the goods in a rented warehouse (App. 73a–76a, 79a). When, in August 1961, petitioner filed for a Chapter XI arrangement of Sterling's debts, the merchandise kept in the warehouse was not disclosed to the bankruptcy court. At that time, claims of creditors against Sterling totaled $175,000 (App. 19a, 83a). The government's evidence also disclosed that in the period February–August 1961, petitioner received various items of jewelry from Slote, which items had not been paid for and were not included in the schedule of the bankrupt's assets (App. 85a, 91a, 93a, 97a–98a, 127a; see App. 95a).

Petitioner testified that he had received the jewelry as payment for legal services. He denied concealing Sterling's assets from the bankruptcy court (App. 324a–326a, 331a, 334a, 345a, 352a–354a, 364a).

ARGUMENT

Petitioner presents no question warranting further review. No conflict with decisions of this Court or among circuits in fact exists; nor is there any occasion for the exercise of this Court's supervisory power.

[2] "App." refers to the appendix to petitioner's brief in the court of appeals, containing excerpts from the transcript of proceedings at trial.

1. Six character witnesses testified for petitioner. Petitioner contends (Pet. 11–18) that the trial judge erred in permitting government counsel to cross-examine two of these witnesses concerning their awareness of newspaper articles reflecting adversely on petitioner's reputation. The contention is, however, relevant only as to one of the witnesses (Preisler), since the record reveals that the trial judge instructed the jury to disregard the testimony of the other witness (App. 415a–416a). With regard to Preisler, the following interchange occurred (App. 407a–408a):

> Q. Did you come about your opinion from what newspapers had said about him or not?
>
> A. No.
>
> Q. Have you read any newspaper accounts about him?
>
> Mr. CARROLL [petitioner's lawyer]. Objection, your Honor.
>
> The COURT. Overruled.
>
> A. Yes.
>
> * * * * *
>
> Q. Did you take into account, or did you not, what you had read about him in the newspapers?
>
> A. I didn't believe them.
>
> Q. What didn't you believe?
>
> A. I didn't believe the articles in the newspapers about him.
>
> Q. What articles?
>
> A. Saying that he had done something dishonest.
>
> Q. What did the newspapers say that he had done dishonest?
>
> A. I don't recall.

Mr. CARROLL. I move the answer be stricken * * *.

The COURT. The objection is sustained. The jury is to disregard the question and the answer.

* * * * *

Q. When you read an account in the newspaper saying that he did something dishonest——

Mr. CARROLL. I object and ask that Mr. McCurdy specify the newspaper of which he is speaking.

Mr. MCCURDY. I will be very glad to do that.

Mr. CARROLL. May we approach the bench on this matter?

The COURT. Yes.

At this point a preliminary examination was held outside the presence of the jury (App. 408a). The full transcript shows that, as brought out at this hearing, government counsel was referring to an article about an incident unrelated to the present charges, which the witness denied having seen. At the conclusion of the hearing, the court ruled that government counsel could not refer to that article, but could ask the witness on what basis he disbelieved the article which he had already testified, he had seen and not credited (Tr. 971–975). There then occurred the cross-examination set forth at pages 13–14 of the petition. On redirect examination, the witness testified that he did not believe that the article pertained to this case (Tr. 978). At the conclusion of the character witness testimony, the court instructed the jury that the cross-examination regarding the derogatory newspaper arti-

cles could be considered only for the purpose of testing the witnesses' familiarity with petitioner's reputation (see Pet. App. 34-36).

In these circumstances, the court of appeals properly held that, considering the limiting instructions, it was not error to permit the cross-examination. In *Michelson* v. *United States*, 335 U.S. 469, this Court stated (*id.* at 479):

> Another hazard [of putting on a character witness] is that * * * [the] witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. * * *

This language, we submit, fully supports cross-examination of character witnesses as to newspaper articles bearing on a defendant's reputation. There is no basis for a distinction between such articles and other types of rumors or reports. See *United States* v. *Giddins*, 273 F. 2d 843, 845 (C.A. 2), certiorari denied, 362 U.S. 971. Indeed, since the existence of a newspaper article may be more readily verified (as was done here) than the existence of a rumor which is merely "afloat" in the community, examination as to familiarity with such an article seems less likely to prejudice a defendant. *Sloan* v. *United States*, 31 F. 2d 902, 905-906 (C.A. 8), is not, in our view, to the contrary. There the court disallowed cross-examination of a character witness based upon a newspaper

article, finding that the "patent purpose of counsel was not impeachment, but to get before the jury the incident [which was the subject of the article]" (*id.* at 906). The record here reveals no such design.[*]

Moreover, Preisler was but one of five character witnesses whose testimony was permitted to be considered by the jury, including two State Common Pleas Court judges and a Congressman, all of whom testified that petitioner's general reputation for truthfulness was good. The evidence of petitioner's guilt was overwhelming. Hence, even if there were error in permitting the cross-examination, it could not have been prejudicial.

2. At the close of the evidence, just prior to adjournment for the weekend, the trial judge instructed the jury not to permit anyone to speak to them about the case and to let the court know if anyone attempted to communicate with them about the case (Pet. App. 40–42). The court of appeals, assuming *arguendo* that the remarks were occasioned by the fact that government counsel advised the judge at a bench conference of learning that some members of the jury had been contacted and offered money, found the judge's admonition to be within the range of his discretion (Pet. App. 43). This holding was fully justified. The portion of the charge which petitioner has italicized (Pet. 24–25) cannot be divorced from the whole charge. Read in context, the remarks of the judge were not improper.

[*] In addition, *Sloan* was cited in the *Michelson* opinion (335 U.S. at 480–481, n. 17) only for the proposition that "[i]t has been held error to use the question to get before the jury a *particular derogatory newspaper article*" (emphasis added).

3. Petitioner contends (Pet. 22) that the trial judge's instructions (Pet. App. 38–40) regarding his theory of defense were inadequate because they did not allude to his contention that he had received the items of jewelry prior to Sterling's contemplation of bankruptcy. The court instructed the jury that, if the jewelry was received by petitioner in compensation for his legal services to the company, then such receipt would not be an offense as charged in Count 1 of the indictment (Pet. App. 39). This hypothesis put the crux of petitioner's defense as to the items of jewelry before the jury. Whether the items were received when the company was in contemplation of bankruptcy was irrelevant to the defense claim.

4. Petitioner contends (Pet. 27–30) that Counts 2 and 4 of the indictment do not charge offenses under 18 U.S.C. 152, which provides in part:

> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation * * * knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation [is guilty of a crime].

Petitioner argues that the word "other", which twice appears before the term "person", modifies not only that term but also the term "corporation", which follows it. Such a construction would except from the law agents of a corporation who conceal or transfer its assets rather than the assets of another corporation. Neither the language of the statute nor its legislative history (see U.S. Code Cong. & Adm. News,

86th Cong., 2d Sess., pp. 3307–3310) supports any such interpretation.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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